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ALEXANDER L. STEVAS,

No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER and JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

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BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments and the Commerce Clause permit a California court to assert personal jurisdiction over a Florida editor and reporter solely on the ground that they worked in Florida, on an article published by their Florida employer, which allegedly libeled a California resident?

2. In determining whether the Fourteenth Amendment permits personal jurisdiction over an out-of-state reporter and editor in a libel case, is it improper to give weight to the First Amendment?

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Court of Appeal (J.A. 107)[1] is reported officially at 138 Cal. App. 3d 128 and unofficially at 187 Cal. Rptr. 825. The order of the Supreme Court of California denying hearing (J.A. 122) is unreported. The opinion of the Superior Court of the State of California for the County of Los Angeles (J.A. 93) also is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered December 15, 1982. J.A. 107. The Supreme Court of California denied a timely petition for hearing on February 10, 1983. J.A. 122. Notice of appeal to this Court was filed on February 16, 1983, J.A. 123, and the appeal docketed February 22, 1983. On April 18, 1983,

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[1] Citations to "J.A." refer to the Joint Appendix filed herein.

this Court entered its order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. J.A. 125. This Court has jurisdiction under 28 U.S.C. § 1257(2), as is further discussed at pp. 49-50, *infra*.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

California Code of Civil Procedure § 410.10 provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Pertinent constitutional provisions are reproduced in Appendix A.

STATEMENT

A. Facts.

Appellee is a professional entertainer, J.A. 9, public figure, J.A. 8-9, and resident of California. With her husband, Mr. Marty Ingels, she brought this action for libel and related torts against the National Enquirer, Inc., publisher of a national weekly newspaper, and also its local distributing company and the two Appellants, Iain Calder and John South. The claim was based on an article that appeared in the Enquirer's October 9, 1979 issue. The article stated that Appellee's husband "has terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood," and that Appellee "has been driven to drink by his bizarre behavior." J.A. 11.

The complaint alleged that the two plaintiffs were public figures.[2] It did not allege any damage to reputation, but did claim emotional distress. J.A. 9. The plaintiffs sought general damages of $10,000,000.00 and punitive

[2] "[W]ell known and well recognized by numerous and diverse citizens and people of the County of Los Angeles and, in fact, of the entire nation . . . ." J.A. 8-9. The complaint alleged that the article was published with reckless disregard of its truth and with intent to harm. J.A. 9.

damages of an additional $10,000,000.00. J.A. 10. After maintaining that the article was untrue, J.A. 14, 78, Appellee's husband filed a voluntary dismissal of his complaint on the morning of his deposition. Appellee has concontinued to pursue the litigation on her own behalf.[3] The complaint stated that both Appellants "in doing the acts herein alleged were acting within the course and scope of their employment." J.A. 8.

Appellant Calder is employed as editor and president of the Enquirer. Appellant South is employed by the Enquirer as a reporter, and his byline appeared on the article. Both Appellants are and were at all relevant times residents of Florida. J.A. 17, 19.[4]

Both appellants were served with process by mail in Florida in accordance with the California "long-arm" statute, under the jurisdictional provisions of Cal. Code of Civil Procedure § 410.10. They caused special appearances to be entered on their behalf and moved to quash service of process, challenging the constitutionality under the First and Fourteenth Amendments of the application of § 410.10 to them. J.A. 15-16, 80-85.[5]

The evidence before the trial court was entirely undisputed, and consisted wholly of affidavits and extracts of

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[3] On May 31, 1983, this Court entered an order dismissing the appeal as to Appellee's husband. Appellee has continued to demand damages of $20,000,000.00, the same amount she and her husband had sought collectively.

[4] The complaint alleged that Appellants "were acting by virtue of their own motives as individuals and also were the agents and employees of defendant National Enquirer, Inc." J.A. 8.

[5] The Enquirer, which is a Florida corporation with principal place of business in Florida, did not contest the California court's jurisdiction and answered the complaint. J.A. 93. The distributing company also answered and made no objection to the jurisdiction. In the Court of Appeal Appellants argued also, as they had pointed out in the trial court, J.A. 83, that jurisdiction over employees in such circumstances would unconstitutionally burden interstate commerce. J.A. 106.

deposition testimony. Without any contradiction it showed the following:

As to Appellant Calder: He edits the newspaper and exercises general supervision of its editorial activities. J.A. 24. He is the second ranking person in the organization J.A. 24, 75, and "oversee[s] just about every function of the Enquirer." J.A. 24. He has no other business activity. J.A. 17. He resides and has his office in Florida. J.A. 17, 75. He has never had an office or place of business in California nor conducted business there. J.A. 17. He has never owned property, obtained credit, or had bank accounts in California. *Ibid.* He had visited California only once during the three to four years preceding 1980, a purely pleasure trip. J.A. 30. Later he visited California once in 1981, after the publication of the article in question, for the purpose of attending and testifying as a witness in an unrelated trial.[6] With respect to the article in question, he had no participation in its investigation, research or writing except for routine editorial services. J.A. 17. He had no knowledge of the source of the story, had never read the reporter's copy of it, and had no dealings with the story except to review an initial evaluation of the subject and, he assumed,[7] routinely to see it in final page proof form. J.A. 27-28. After it was published he decided not to print a retraction, J.A. 29, because "we stand by the article and as far as I'm concerned the story is true," *ibid.* All his activities regarding the article took place at his office in Florida. J.A. 17. All were performed as part of his duties as an employee of his employer, and not in a personal capacity. *Ibid.*

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[6] Although Appellee's attorneys were present in the courtroom at that 1981 trial and say that they observed Appellant Calder's presence, J.A. 46, they made no attempt to serve him personally with process in California.

[7] "I would imagine I saw that. I don't specifically recollect seeing it, but I would have seen it." J.A. 28.

As to Appellant South: He is a reporter employed by the Enquirer. Like Calder, he is a Florida resident and his office is at the Enquirer newsroom in Florida. J.A. 19. He never has had an office in California, nor has he ever engaged in any business activity in California in his personal capacity, nor owned assets, obtained credit, nor maintained a bank account there. J.A. 19, 34. All of South's services in connection with the article, according to his uncontradicted affidavit, took place in Florida. J.A. 19.

South researched and wrote the first draft of the article, and his byline appears on it. J.A. 13. Normally after a draft is turned in, the final article is prepared by a rewrite editor. J.A. 60, 63. It was uncontradicted that South did not travel to California in connection with the article. J.A. 19, 90-91. The record shows that he made three long-distance telephone calls from Florida to California in connection with research for the article, two to an Enquirer stringer, Ms. Dayzhun Jane Chesis, one to a Ms. Betty Hager. J.A. 50, 56-57, 65, 69-70, 74. He may have made others.[8] The only other contact with California by Appellant South that related in any way to the article was an additional long-distance telephone call from Florida to Appellee's husband Mr. Ingels, to read him the draft article so that he might comment upon it. J.A. 71.[9] All of South's activities regarding the article were performed as part of his duties for his employer, and not in an individual capacity. J.A. 19.

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[8] The exact number does not appear in the materials submitted for the record by Appellee. Although it was not part of the record before the courts below, Mr. John Robert Lucas in a subsequent deposition testified that there was one additional investigative long-distance telephone call to him. See Appendix B; *cf.* J.A. 35-36.

[9] Mr. Ingels denied the truth of the article, and his denial was included in the final version as published. J.A. 13. According to the article, J.A. 13, and to Appellant South's description as recounted to a witness, Mr. Ingels in the conversation was "amused" and said he was "flattered" and to "print it." J.A. 71. According to Mr. Ingels, he became ill and upset. J.A. 78.

Regarding contacts with California unrelated to the article, Appellant South stated that in the course of his employment during a four-year period he had visited California more than twenty times in total. J.A. 32.[10] On two occasions prior to the article's publication he had met with Mr. John Robert Lucas, a sometime source in California. J.A. 34. Those visits concerned a number of articles, *ibid.*, but not the one about Appellee, J.A. 19. South also telephoned Mr. Lucas frequently. J.A. 35-36.

B. The Superior Court's Ruling.

Based on the evidence submitted, all of which was documentary, the trial court found:

> "From the record in this case, it appears that neither South nor Calder maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the Ingels article. Reporter South made a few telephone calls into California, including one in which he read the substance of the article to plaintiff Ingels shortly before its publication. In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article. The totality of such contacts, in this Court's view, are insubstantial." J.A. 94.[11]

The trial court concluded that "as the U.S. Supreme Court has made abundantly clear in its *World-Wide Volkswagen* and *Kulko* opinions," J.A. 95-96, the motion to quash service should be granted. J.A. 98, 99. It observed that the conclusion might be different had this been a case "in which a defendant ships a dangerous and defective

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[10] Ms. Chesis estimated that South came to California more than six, but less than a dozen times per year. J.A. 66. All his trips were on his employer's business. J.A. 33, 66.

[11] Appellants emphasized to the trial court that there was no basis in the record to support an inference that South had visited California in connection with the article, and that his affidavit that he had not done so, J.A. 19, was uncontradicted. J.A. 90-91. See note 19, *infra*.

product into the state, which leads to an accident within the state." J.A. 94. But that, the court emphasized, was not this case:

> "The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher. . . . [T]he cases seem to be in agreement that First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action." J.A. 95-96.

The court observed that "if reporters and editors are required to appear in remote jurisdictions and defend against claims for punitive damages, it is foreseeable that such actions would have a chilling effect on reporters and editors." J.A. 97. The

> "principal practical effect of holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals. . . . Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness." J.A. 96-97.

The court contrasted the jurisdictional position of employees with that of a company doing interstate business:

> "It may not be unfair to hold a publisher to account for compensatory and punitive damages in a remote jurisdiction if a sensational story he publishes is false. After all, it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher who stands to make substantial profits if he publishes true stories of widespread interest.
>
> "It is quite another matter to hold magazine employees to the same accounting. A reporter or editor who suffers an award of punitive damages would

not be entitled to reimbursement from his employer, nor to indemnification based on any insurance policy the employee or the employer might have. Thus, punitive damages would come from the employee's own pocket. Few would be willing to risk writing or editing controversial articles for national publications if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for punitive damages, and surely pay unlimited litigation expenses. Thus, prudent reporters and editors would have an incentive to avoid controversial stories vastly disproportional to the rewards they could expect for their diligence and industry in uncovering truthful but controversial stories, especially stories adverse to wealthy or powerful individuals. If such a state of affairs were to come to pass, the informed public would be the loser." J.A. 97.

C. The Court of Appeal's Reversal.

On appeal, the California Court of Appeal acknowledged that "clearly there can be no general jurisdiction in the present case as a result of defendants' contacts with California consisting of occasional trips to that state." J.A. 113. It noted that

> "Neither defendant has ever owned assets or bank accounts in California or engaged in business or been employed there. It may not be said that defendants' activities in California are extensive, wide-ranging, substantial, continuous or systematic." J.A. 112-13.

The trial court had erred, however, said the Court of Appeal, by giving any weight to First Amendment considerations in its jurisdictional analysis:

> "Plaintiffs contend that the trial court improperly applied a special First Amendment test in determining that the court may not assume jurisdiction over defendants Calder and South. We agree." J.A. 110.

The Court of Appeal held that "personal jurisdiction over them must be determined in accord with traditional prin-

ciples unaffected by First Amendment considerations." J.A. 111. The court said that only "minimal contacts," J.A. 112, with California need be shown.

On that basis the court looked first at Appellant Calder:

> "As the trial court observed, defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida." J.A. 122-13.

Nevertheless, the court held, California's jurisdiction over the Florida editor (and over the reporter as well) was established simply because the complaint alleged an intentional tort with injury in California. As the Court of Appeal explained in its view of the law:

> "For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein." J.A. 114.

The court conceded that a California Supreme Court case [12] had rejected extraterritorial personal jurisdiction in a contract claim premised on an effect caused in California, when it had not been shown that the defendant "purposefully availed himself of the privilege of conducting business in California or of the benefits and protections of California law," or anticipated economic benefit from dealings in California, or that the transaction was subject to special regulation in California. J.A. 114-15. Nevertheless, the court below announced,

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[12] *Sibley* v. *Superior Court*, 16 Cal. 3d 442, 546 P.2d 322, *cert. denied sub nom. Carlsberg Mobile Home Properties, Ltd.*—'72 v. *Sibley*, 429 U.S. 826 (1976).

> "such conditions need not be met where jurisdiction is predicated on an act or omission committed outside the forum state with the intent to cause a tortious effect within the state." J.A. 115.

The court said that the same theory of effect in the state gave jurisdiction over Appellant South as well. J.A. 116. For South it also announced two additional alternative theories for jurisdiction over him: First, the Court of Appeal believed that it sufficed to show that from Florida he had made one long-distance telephone call to Mr. Ingels, allegedly causing Ingels distress, which "constituted the doing of a significant act in California." J.A. 116. As the other alternative theory, the court said that extraterritorial personal jurisdiction over South was established because "he gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California and telephone calls which he made to the state." J.A. 115.[13]

The court acknowledged that all of Appellants' acts were taken solely on behalf of their corporate employer, but held that Appellants nevertheless could be subjected to jurisdiction personally based on the same acts. It noted that other courts, including the federal courts of California, had held the contrary.[14] J.A. 116-17.

Having concluded that an allegation of effect sufficed for contacts, the court said that the test for extraterritorial jurisdiction was simply to weigh on the one hand "inconvenience to the defendant," against on the other "the interest of the plaintiff in suing locally" and the "interest of a state in providing a forum for its residents." J.A. 117-18. It reversed the judgment. The Supreme Court of California denied review. J.A. 122.

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[13] Regarding the absence of record evidence to support the visit the court hypothesized, see note 11, *supra*.

[14] *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978).

SUMMARY OF ARGUMENT

Whether considered with or without the First Amendment, the judgment of the court below is not consistent with the Due Process Clause as interpreted in many decisions of this Court.

In the first place, the contacts of these two individuals with California—nonexistent in the case of Calder, confined to a few long-distance telephone calls in the case of South [15]—were not sufficient to meet the standard of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Neither Appellant as an individual "purposefully availed himself," see *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958), of a privileged granted by California, and indeed under the Due Process and Privileges and Immunities Clauses, and the First Amendment, news-gathering is not a privilege that California could take away. Moreover, where extraterritorial personal jurisdiction over an individual rather than a corporation is asserted, the level of contacts required by due process is even greater.

It is settled law, moreover, that a nonresident agent of a corporation does not become personally subject to extraterritorial jurisdiction for acts he does for a corporate principal. The broad theory most relied upon by the court below—that extraterritorial jurisdiction is constitutional whenever it is alleged that an act outside the state intentionally caused a tortious result within it—simply is not the law. "The "effect" theory of jurisdiction has been applied only by a few state courts, and only to companies that manufacture physically hazardous products and market them generally. When such hazards of physical danger are not present, even the same courts

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[15] Even if South had made one news-gathering visit to California in connection with the article, the jurisdictional analysis would be no different. See notes 11, *supra*, and 19, *infra*.

have refused to apply the theory. See, *e.g.*, *Green* v. *Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 427 N.E.2d 1203 (1981).

The court below also erred in rebuking the trial court for considering the effect an assertion of extraterritorial jurisdiction over reporters would have on activity protected by the First Amendment. This Court has made clear for decades that the scale of due process weighs all significant factors and policies, and certainly does not exclude any policy as important as the one explicitly written in the First Amendment, and made applicable to the states through the very same Due Process Clause of the Fourteenth. Appellants' employer, the National Enquirer, Inc., did not contest California's jurisdiction over it. As a practical matter, all that libel plaintiffs ordinarily would gain from being able to reach out for nonresident reporters in other states is an opportunity for personal punitive damages; that is an insubstantial consideration when weighed against the damage to the public's information sources, including small publishing individuals and enterprises, that would flow from permitting extraterritorial jurisdiction of this kind.

Finally, even if there were no Due Process Clause; even if there were no First Amendment; the California long-arm statute as applied here still would clearly be constitutionally invalid under the long line of decisions in which this Court has applied the Commerce Clause to strike down state laws that unduly burden interstate commerce. California's assertion here of personal jurisdiction over corporate employees in other states threatens interstate businesses of every kind. And when applied in this instance to corporate employees of a publisher, it threatens not just the free trade in commerce, but the free trade in ideas as well.

ARGUMENT

I. CALIFORNIA'S ASSERTION OF EXTRATERRITORIAL JURISDICTION OVER THESE FLORIDA INDIVIDUALS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Contacts of Appellants With California Were Too Slight To Satisfy the Test Applied for Foreign Corporations.

The due process standards governing a state's power to exercise extraterritorial personal jurisdiction over nonresidents are clear. They are stated in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Those standards were not remotely met in this case.

At least since Chief Justice Stone's opinion for this Court in *International Shoe*, *supra*, this Court has adhered to the rule that due process forbids extraterritorial personal jurisdiction by a state court over a nonresident defendant unless the plaintiff establishes (1) that the defendant had at least a minimum level of contacts with the forum state,[16] and also (2) that to exercise jurisdiction is consistent with "traditional notions of fair play and substantial justice." 326 U.S. at 316. In *Hanson* v. *Denckla*, 357 U.S. 235 (1958), this Court explained that although *International Shoe* was less rigid than the strict territorial rule of *Pennoyer* v. *Neff*, 95 U.S. 714 (1878):

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so

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[16] As explained by this Court later in the same Term, the holding of *International Shoe* was simply that for a corporation "'mere solicitation' when it is regular, continuous and persistent, rather than merely casual, constitutes 'doing business,' contrary to formerly prevailing notions." *Nippert* v. *City of Richmond*, 327 U.S. 416, 422 (1946).

> unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 357 U.S. at 251.

Hanson v. *Denckla* emphasized that the constitutional standard looks to the defendant's forum-related activities:

> "[I]t is essential in each case that there be some act by which the *defendant purposefully avails [him]self* of the privilege of conducting activities within the forum State." 357 U.S. at 253, as quoted in *Kulko* v. *Superior Court*, 436 U.S. 84, 93-94 (1978), and also in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 298 (1980) (emphasis supplied).

Moreover,

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." *Ibid.*

Most recently, in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), this Court held that the limitations imposed by the Due Process Clause involve two distinct considerations: both (1) protection to defendants from being haled into distant courts; and (2) preserving the national union, and other states, from the effects of one state's seeking to regulate or punish conduct and persons beyond its jurisdictional limits:

> "The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." 444 U.S. at 291-92.

Both of those constitutionally protected interests are jeopardized by the ruling of the California Court of Appeal in this case.

1. *Calder's Lack of Contacts.*

The evidence is undisputed, and both courts below found, J.A. 94, 113, that Iain Calder, the editor and president of the Enquirer, had no contacts at all with California: "all of his acts with reference to that article apparently were performed in Florida." J.A. 113. He did not even make a long-distance telephone call. His only connection with the story complained of was the performance of routine editorial services, in the course of which he probably read the story in proofs. J.A. 17, 27-28.[17]

Such an absence of any association with California means that that state cannot assert extraterritorial jurisdiction over Appellant Calder, unless the acts of his corporate employer can be imputed personally to him. The record in no way supports such an alter-ego finding, however, which neither court below supposed,[18] and this Court last year noted that as a matter of agency law it is the agent's acts that are imputed to the principal—not the (publisher) principal's to the (employee) agent. *General Building Contractors Ass'n* v. *Pennsylvania*, 102 S.Ct. 3141, 3151 (1982).

Extraterritorial personal jurisdiction, this Court has held, must be based on contacts of the defendant with the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*. To assert that jurisdiction can be obtained over him because in Florida he routinely read an article before it was published by his corporate employer would be to overrule *World-Wide Volkswagen Corp.* v. *Woodson*, not to mention *International Shoe*. The due process "clause does not contemplate that a state may make binding a

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[17] After publication he declined on behalf of the corporation to print a retraction because "as far as I'm concerned the story is true." J.A. 29.

[18] Mr. Calder was the second in command of the corporation. J.A. 24, 75. Nothing in the record discloses what if any stock ownership he held in its parent company.

judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe*, *supra*, 326 U.S. at 319; *Rush* v. *Savchuk*, 444 U.S. 320, 332-33 (1980); *Shaffer* v. *Heitner*, 433 U.S. 186, 216 (1977). Due process requires contacts with the forum state. Appellant Calder had none.

2. *South's Telephone Calls.*

Appellant South's contacts with California, insofar as they relate to the article in question, were scarcely greater than Appellant Calder's. South did not visit California even once in connection with that article,[19] and only four long-distance telephone calls by him into that state were established with any degree of certainty.[20]

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[19] The trial court with no record basis simply speculated that he had made one such visit. See note 11, *supra*. That speculation is entitled to no weight because it was not based on a personal judgment of credibility (all the evidence was documentary), it contradicts Appellant South's undisputed affidavit, J.A. 19, and it fails to reflect that the burden of proving facts to establish jurisdiction was Appellee's. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980) ("Since plaintiff failed to counter the affidavits, the jurisdictional facts stated therein are controlling."). See J.A. 90-91. Nevertheless, the Court of Appeal repeated the same speculation. J.A. 115. This Court, particularly in a case involving the First Amendment, is not bound by a conclusion of a lower court that has no basis in the record. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964).

The utter baselessness of that speculation is confirmed by the fact that two months after the trial court's decision, Mr. Lucas was deposed and testified that although on one occasion he had discussed the subject of the article with Mr. South during a long-distance telephone call, he had never discussed it with South when South was in California. See Appendix B.

[20] See p. 5, *supra*. There was in addition one long-distance telephone call from Florida to Mr. Lucas. See Appendix B. The trial court concluded that Appellant South "made a few telephone calls into California." J.A. 94.

The Court of Appeal held that these investigative long-distance telephone calls from a reporter in Florida "constituted the doing of a significant act in California" sufficient to support extraterritorial personal jurisdiction. J.A. 116. But that again is not the law. If it were, the contacts requirement of *International Shoe* and *World-Wide Volkswagen* would be practically meaningless. More than *25 billion* long-distance telephone calls are made in this country every year.[21] If each of them could be potentially the basis for jurisdiction over the caller by the receiving state, then California would be close to regulating primary conduct in Florida, and the limits on sovereignty implicit in due-process limitations on state jurisdiction, *World-Wide Volkswagen*, *supra*, 444 U.S. at 292, would vanish. For that reason the sensible rule applied up to now has been that long-distance telephone calls do not suffice to establish extraterritorial jurisdiction. Mindful of the contacts required by due process and the constitutional framework, courts have held that "use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the state." *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion*, 614 F.2d 1247, 1254 (9th Cir. 1980). This is particularly so when as here the telephone calls were simply to obtain information, and were not forming a contractual relationship.[22]

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[21] AMERICAN TELEPHONE & TELEGRAPH CO., 1982 ANNUAL REPORT 27 (1983). The figure includes some intrastate toll calls, but does not include interstate calls on local exchanges, *e.g.*, from Washington, D.C. to Fairfax, Virginia.

[22] *Accord, Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 597 F.2d 596, 604 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980) (rejecting assertion of jurisdiction even when telephone calls were part of contract); *Warren* v. *Dynamics Health Equip. Mfg. Co.*, 483 F. Supp. 788, 791 (M.D. Tenn. 1980); *Marshall Egg Transp. Co.* v. *Bender-Goodman Co.*, 275 Minn. 534, 148 N.W.2d 161 (1967).

3. *South's Visits on Other Business.*

South made no visits to California in connection with the article of which Appellee complained. J.A. 19, 90-91; see notes 11, 19, *supra*. And even if he had made a visit on his employer's behalf for the purpose of gathering information for the article, that single visit, as the trial court recognized, J.A. 94, would not be a substantial enough basis for assertion of jurisdiction.

The fact that Appellant South visited California for his employer on other occasions is jurisdictionally irrelevant, as both lower courts also held.[23] Neither gave any weight to South's visits that were unrelated to the article. *Cf.* J.A. 94, 115-16. Visits for other purposes would be relevant only to support a theory that South was personally present in California so pervasively that that state would have general jurisdiction over him for all purposes. But even the Court of Appeal acknowledged that "clearly there can be no general jurisdiction in the present case as a result of defendants' contacts with California consisting of occasional trips to that state." J.A. 113.[24] *Accord, Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U.S. 516 (1923); *International Shoe Co.* v. *Washington*, *supra*, 326 U.S. at 317.

4. *Neither Appellant Purposefully Availed Himself of a Privilege Granted by California.*

Even if South had often visited California to gather information about this story—and the record shows he never visited it at all for that purpose—the due process

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[23] *Cf. Shaffer* v. *Heitner*, *supra*, 433 U.S. at 209: jurisdiction is not established when "the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action."

[24] Appellee also argued, as an afterthought, that extraterritorial jurisdiction might be asserted over South because—outside California—he executed an affidavit to be filed in another California proceeding. J.A. 86-89. The trial court described that argument as "nonsense," J.A. 91, and the Court of Appeal never bothered to refer to it.

requirements for jurisdiction still would not have been met. An information-gathering visit is totally different from a sales visit. Nor would an information-gathering visit be tortious, as was the automobile accident of the out-of-state driver in *Hess* v. *Pawloski*, 274 U.S. 352 (1927). Information-gathering visits of reporters should not be treated as jurisdictionally significant. See, *e.g.*, *Layne* v. *Tribune Co.*, 71 F.2d 223 (App. D.C.), *cert. denied*, 293 U.S. 572 (1934) (statute); *Margoles* v. *Johns*, 483 F.2d 1212 (D.C. Cir. 1973).

Moreover, it cannot be said that a reporter coming to gather information "purposefully avails himself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla*, *supra*, 357 U.S. at 253; *Kulko* v. *Superior Court*, *supra*, 436 U.S. 93-94; *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 297. The opportunity of individuals generally to travel freely from state to state is not a state-granted privilege, but rather a national right. *Edwards* v. *California*, 314 U.S. 160 (1941); *Ward* v. *Maryland*, 12 Wall. 418, 430 (1871); *Crandall* v. *Nevada*, 6 Wall. 35 (1868); U.S. CONST., Art. IV, § 2. Further, when the individual is a reporter gathering news, he is exercising a freedom protected under federal law by the First and Fourteenth Amendments that a state may not hinder or impede. Such a news-gathering visit, or telephone call, unlike the corporation's decision to do or transact business in the state or the motorist's to use the state's highways, is not the "purposeful availing" of a state-conferred privilege that can support jurisdiction over a nonresident. *Cf. Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 82 (1938) (rejecting as due process violation an attempt by California to tax out-of-state transactions where it could not withhold the privilege of doing business) (Stone, J.).

The record does not show that either Appellant profited directly from their employer's editorial and marketing decisions with respect to California. As the trial court noted, the risks and the rewards, and the option to pull

back, all were the corporation's. J.A. 97. As this Court observed in analogous circumstances,

> "State Farm's decision to do business in Minnesota was completely adventitious as far as Rush was concerned. He had no control over that decision . . . . In short, it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable . . . ." *Rush* v. *Savchuk*, 444 U.S. 320, 328-29 (1980) (emphasis in original).[26]

5. *Convenience Is Not the Test.*

For an individual to try to defend a multi-million-dollar suit in a state court thousands of miles away from his home and place of business is not an easy prospect. But even if the foreign state were as near as Maryland or Virginia is to this Court, the threshold requirement for necessary contacts with the forum would not disappear. As this Court explained in *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*,

> "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson* v. *Denckla*, *supra*, at 251, 254." 444 U.S. at 294.

It certainly is not constitutionally sufficient to assume, as the court below did, that due process is satisfied if an effect is alleged on a plaintiff who is a resident of the forum. The court below stressed that "this state and its residents and taxpayers have a substantial interest in providing a forum where a resident may seek whatever

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[26] *Cf.* Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp.* v. *Woodson and Rush* v. *Savchuk*, 58 N.C.L. REV. 407, 427 (1980).

redress is due him." J.A. 118.[26] But what due process requires is at least minimum significant contacts with the forum *by the defendant. International Shoe, supra.* This Court has made that requirement unequivocally clear, rejecting decisions in which

> "The State's interests in providing a forum for its residents . . . are substituted for its contacts with the defendant and the cause of action. This subtle shift in focus from the defendant to the plaintiff . . . .
>
> "Such an approach is forbidden by *International Shoe* and its progeny." *Rush* v. *Savchuk, supra,* 444 U.S. at 332.

See also, *e.g., Green* v. *Advance Ross Electronics Corp.,* 86 Ill. 2d 431, 439, 427 N.E.2d 1203, 1207-08 (1981). The defendant's contacts are essential; they cannot be satisfied by those of the plaintiff. Indeed, if a plaintiffs' contacts could suffice, there would have been no need for this Court's opinion in *International Shoe Co.* v. *Washington, supra,* because there the plaintiff was the state itself, whose contacts with itself, one supposes, could not have been greater.

What is at stake in this case is not only inconvenience, anxiety and expense for individuals forced to defend in a distant state for acts done at home. More, it is the attempt by California to reach far beyond its borders and regulate and punish primary conduct of individuals in other states.

It is tempting to a state to try to extend its reach in such a manner. "[U]nder the relentless prod of local interest, the state's long arm will inevitably reach farther and farther."[27] The very California statute whose application is challenged here was drafted as broadly as the English language allows, not with any specific set of state concerns in mind, but simply to sweep into the

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[26] Quoting *Hall* v. *University of Nevada,* 8 Cal. 3d 522, 525-26, 503 P.2d 1363, 1365 (1972).

[27] Louis, *supra* n. 25, at 432.

state's jurisdiction all the future activity and persons outside its borders that the California could possibly claim to control. And as applied by the California courts, this long-arm statute has been extended, as in the present case, whenever California was satisfied that California was a convenient forum. See Ottonello, *California's Convenience-Oriented Approach to Personal Jurisdiction: A Critical Review*, 13 LINCOLN L. REV. 21, 31, 35 (1982) ("The California Supreme Court did not follow the straight forward rule of *Hanson*." "The California Supreme Court has proceeded on weak constitutional grounds in allowing convenience factors to compensate for an insufficient or nonexistent showing of minimum contacts."); *cf. Cornelison* v. *Chaney*, 13 Cal. 3d 143, 545 P.2d 264 (1976) (*held*, jurisdiction under § 410.10 over nonresident Nebraska trucker for accident in Nevada that injured a California resident); *Kulko* v. *Superior Court*, 19 Cal. 3d 514, 564 P.2d 353 (1977), *reversed*, 436 U.S. 84 (1978).

When states do reach beyond their borders to regulate primary conduct, the problems created are more than theoretical. A reporter in Florida under the decision below, and his employer, could not be sure of which state would try him, nor of which state's law would be applied. State courts, once they have jurisdiction, under current relaxed choice-of-law doctrine tend to apply their own law. See, *e.g.*, *Babcock* v. *Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); *Mellk* v. *Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Foster* v. *Leggett*, 484 S.W.2d 827 (Ky. 1972) (state applied "better law"—its own—to accident in another state). Due process, to the extent it limits extraterritorial jurisdiction, "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimal assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 297. The less predictable the forum, the less predictable the standard gov-

erning primary conduct.[28] This Court has held that in choice-of-law questions, the Constitution does not mandate a single answer. *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981). A forum state may even adopt one part of another state's law, but not the rest. *Nevada* v. *Hall*, 440 U.S. 410 (1979). The absence of constitutional standards as to choice of law is one reason why extraterritorial jurisdiction must be watchfully policed, to protect federalism and the interests of other states and their citizens. See *Shaffer* v. *Heitner*, *supra*, 433 U.S. at 197; Silberman, *Commentaries on Shaffer* v. *Heitner*, 53 N.Y.U. L. REV. 33, 88 n.286 (1978).[29]

B. The Contacts of Appellants With California Were Too Slight To Satisfy the Higher Standard That Must Be Met for Extraterritorial Jurisdiction Over Individuals.

Even if Appellants were a publishing enterprise, therefore, the level and quality of contacts required by *International Shoe Co.* v. *Washington*, *supra*, were not met. But they are not a publishing enterprise; they are individuals. And the level of contacts required when the defendant is an individual is different, and must take into account the differences between an individual and a business entity.[30] "[T]here are relatively few circumstances

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[28] As Mr. Justice Jackson observed, "I doubt that the position can long be maintained that the reach of a state's power is a byproduct of an interest. The ultimate answer, it seems to me, will have to be based on considerations of state relations to each other and to the federal system." Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 28 (1945).

[29] "When the approach that allows a state to apply its own law in marginal cases is augmented by expanded bases of personal jurisdiction . . . the combination raises the specter of massive invasions by one state into the policies of another, rigidly enforced by the rules of full faith and credit to judgments." Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 230 (1976) (footnote omitted).

[30] Corporations have been treated differently from natural persons with respect to various constitutional provisions. See, *e.g.*,

under which one should be summoned to trial outside of his home district or state." Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 22 (1945).

International Shoe focused not on individual defendants, as to whom territorial tests of jurisdiction were relatively easy to apply, but rather on foreign corporations, as to which the test of jurisdiction had to involve more assumptions and judgment. The question answered there was the same one put by Judge Learned Hand in the case that broke the ground for *International Shoe*: "what dealings make it just to subject *a foreign corporation* to local suit." *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930) (emphasis supplied); *cf. International Shoe, supra*, 326 U.S. at 317. This Court shortly afterwards referred to "our recent decision in *International Shoe* v. *Washington*, 326 U.S. 310, which was concerned with the jurisdiction of a state over a foreign corporation." *United States* v. *Scophony Corp.*, 333 U.S. 795, 804 n.13 (1948). *International Shoe* was written broadly enough that its principles can apply both to corporations and to individuals. However, as this Court recently recognized,

> "The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the

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Hale v. *Henkel*, 201 U.S. 43 (1906); *United States* v. *White*, 322 U.S. 694 (1944) (Fifth Amendment privilege against self-incrimination); *People* v. *Consolidated Edison Co.*, 42 Misc. 2d 422, 248 N.Y.S.2d 267 (1964) (criminal jurisdiction). See Note, 92 HARV. L. REV. 1227, 1230 (1979). The unique nature of corporations, this Court has noted, has led to unique jurisdictional rules for them. *United States* v. *Scophony Corp.*, 333 U.S. 795, 802-03 (1948); *cf. Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

other." *Shaffer* v. *Heitner*, 433 U.S. 186, 204 n.19 (1977).[31]

The commentators traditionally distinguish between standards for jurisdiction over corporations and over individuals. *Compare* RESTATEMENT (2D), CONFLICT OF LAWS, *Chapter* 3, Topic 1, Title B, *with id.*, Title C; *compare* R. FIELD & B. KAPLAN, CIVIL PROCEDURE, Section 1 ("Natural Persons") *with id.*, Section 2 ("Corporations"), at 625, 650 (temp. 2d ed. 1968).

The first leading case in which this Court focused on state long-arm jurisdiction asserted over individuals not in busines for themselves was *Hess* v. *Pawloski*, 274 U.S. 352 (1927). In upholding jurisdiction, it did so for practical and policy reasons, because of the dangerous nature of automobiles, the seriousness of physical injuries they can cause, and the widespread difficulty of remedy if drivers fled the state. See *Olberding* v. *Illinois C.R.R.*, 346 U.S. 338, 341 (1953). In other contexts, when attempts have been made to assert extraterritorial jurisdiction over nonresident individuals not personally engaged in business for themselves, or not personally committing tortious acts within the state, this Court has rejected them. *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1947); *May* v. *Anderson*, 345 U.S. 528 (1953).

C. An Employee Cannot Be Subjected to Extraterritorial Jurisdiction for Acts Performed Solely for the Employer.

As a corollary of the recognized differences between natural persons and corporations in measuring jurisdictional contacts, it is well established that jurisdiction over a foreign corporation does not carry with it juris-

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[31] In *Flexner* v. *Farson*, 248 U.S. 289, 293 (1919), this Court through Mr. Justice Holmes distinguished individuals from corporations on the ground that a state might exclude the latter but not the former. Later a nonresident individual engaging in a local business specially regulated by the state and with an agent in the state was treated for jurisdictional purposes like a corporation. *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623 (1935).

diction over the corporation's employees for their actions on its behalf. In the present case the complaint alleged that both Appellants "in doing the acts herein alleged were acting within the course and scope of their employment," J.A. 8, and their unchallenged affidavits confirmed that each performed whatever acts he did respecing the article solely in the course of his employment and "not acting in a personal capacity." J.A. 17, 19.

Contacts with a state that count under *International Shoe*, this Court has held, are personal to the actor and must be voluntarily undertaken on *his own* behalf, for "it is essential . . . [that] the defendant purposefully avails *itself*" (or himself) of the benefits and protections of the forum state. *Hanson* v. *Denckla*, *supra*, 357 U.S. at 253 (emphasis supplied). As explained by one court in a leading case:

> "The situation here is much like activity by a corporate employer who, by performing corporate business, causes the corporation to purposefully avail itself of the law of another state. Absent a ruse to conceal an employee's personal activity behind the corporate shield, it is most difficult to conclude that the employee purposefully availed himself of a distant forum's laws." *Idaho Potato Comm'n* v. *Washington Potato Comm'n*, 410 F. Supp. 171, 181 (D. Ida. 1976).

As *Hanson* v. *Denckla* held, each defendant's contacts with the forum must be measured individually; they cannot simply be lumped to achieve jurisdiction over all. This Court accordingly long has held that the fact that a subsidiary does business in a state does not confer jurisdiction over the parent, even if the subsidiary is wholly-owned. *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925).

This is consistent with the fairness that is a part of due process. As the trial court pointed out, "it is the publisher who balances risk and reward in establishing the character of his publication, and it is the publisher

who stands to make substantial profiits if he publishes true stories of widespread interest." J.A. 97. Reporters and editors have no direct personal economic stake in their employer's sales in a distant state—nor is the ordinary employee able to control his employer's marketing activities. Due process considers whether, and by whom, a decision to market in a distant state was taken. *Cf. World-Wide Volkswagen Corp.* v. *Woodson*, *supra*.

A vast number of cases therefore have held, either as a matter of due process or as a construction of state long-arm statutes, that even if a nonresident corporate officer or employee of a foreign corporation enters the forum state in connection with the controversy at bar, his acts there which give rise to extraterritorial jurisdiction over the corporation do not also create extraterritorial jurisdiction over the individual. The Ninth Circuit, in a case specifically rejected by the court below, explained that

> "a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." *Forsythe* v. *Overmyer*, 576 F.2d 779 (9th Cir.), *cert. denied*, 439 U.S. 864 (1978).

Such an exercise of jurisdiction over a nonresident "would violate 'federal due process.'" *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371, 372 (9th Cir. 1977). The court below also specifically rejected the holding of the court through Chief Judge Weinstein in *Bulova Watch Co.* v. *K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E.D. N.Y. 1981), that

> "under the 'fiduciary shield' doctrine, the acts of a corporate officer or employee taken in his corporate capacity within the jurisdiction generally do not form the predicate for jurisdiction over him in his individual capacity."

The cases and policy were thoroughly analyzed last year by the Supreme Court of Iowa in *State ex rel. Miller* v. *Internal Energy Management Corp.*, 324 N.W.2d 707 (Ia. 1982). See also 3A W. FLETCHER, CYCLOPEDIA OF THE

LAW OF PRIVATE CORPORATIONS § 1296.1 (Rev. perm. ed. 1975); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069 (Supp. 1980). "If such suits against officers of national corporations were ever permitted, the individuals could be sued in every state of the union whenever they make telephone calls or write letters to a customer . . . ." *Weller* v. *Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974). Such has never been the law.

In the present case, the Court of Appeal's rejection of settled due process doctrine[32] is even more extreme, because here the two Appellants, who acted only in their corporate capacity, did not even enter California at all in connection with this dispute. The claim that jurisdiction over a nonresident publishing company carries jurisdiction over its nonresident reporters has been rejected. *Margoles* v. *Johns*, 483 F.2d 1212 (D.C. Cir. 1973);

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[32] For examples of decisions resting on due process, see, *e.g.*, *Weller* v. *Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974); *Wilshire Oil Co.* v. *Riffe*, 409 F.2d 1277, 1282-83 (10th Cir. 1969) ("unless the agents transact business on their own account and not on behalf of the corporation; the agents are not engaged in business so as to sustain an application of the long-arm statute to them as individuals"); *Idaho Potato Comm'n* v. *Washington Potato Comm'n*, 410 F. Supp. 171 (D. Ida. 1975); *State ex rel. Miller* v. *Internal Energy Management Corp., supra; Hurletron Whittier, Inc.* v. *Barda*, 82 Ill. App. 3d 443, 402 N.E.2d 840 (1980). For decisions reaching the same result construing state long-arm statutes, *see, e.g., Marine Midland Bank* v. *Miller*, 664 F.2d 899 (2d Cir. 1981); *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980); *Lehigh Valley Industries, Inc.* v. *Birenbaum*, 389 F. Supp. 798, 803-804, *aff'd*, 527 F.2d 87 (2d Cir. 1975) ("It is axiomatic that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation. That is to say, an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual."); *Willner* v. *Thompson*, 285 F. Supp. 394, 397 (E.D.N.Y. 1968) ("Since the corporate defendant is not the agent of the individual defendant, its acts cannot possibly be attributed to him.").

Bradlee Management Services, Inc. v. *Cassells*, 249 Ga. 614, 292 S.E.2d 717 (1982).[33]

D. Alleging a Non-Physical Effect in the Forum State Is Not Sufficient for Extraterritorial Jurisdiction.

In the years since *International Shoe*, many states (like California) have rewritten their long-arm statutes to sweep in whatever the Constitution will bear, and a few courts have extended extraterritorial jurisdiction to hold that if a dangerous manufactured object causes injury in the forum state, nothing more for jurisdiction is required. The two leading cases are *Buckeye Boiler Co.* v. *Superior Court*, 71 Cal. 2d 893, 458 P.2d 57 (1969) (pressure tank explosion); and *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961) (water heater explosion). Both *Gray* and *Buckeye Boiler*, it is generally recognized, pushed due process to the very limits, and if correctly decided are explainable in part by the nature of the injury and by unique circumstances present there.[34] This Court did not

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[33] The only case cited as authority by the court below was an anomalous district court decision, not involving defamation claims, which specifically acknowledged that "as a rule the courts have declined to exercise personal jurisdiction over individuals for their acts done in a personal capacity." *Donner* v. *Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1233 (E.D. Pa. 1979).

[34] *Buckeye Boiler*, besides emphasizing the seriousness of the harm and the need for strict liability to discourage careless manufacture of dangerous products, also relied on the fact that the California plaintiff was suing both the Ohio boiler manufacturer and a California physician who had (allegedly negligently) treated him for his injuries. Each defendant claimed the other was at fault. To decline jurisdiction over the Ohio corporation, said the court, might lead to inconsistent verdicts and the possibility that the plaintiff would not recover at all. See 71 Cal. 2d at 906, 458 P.2d at 67.

In *Gray*, the court held that jurisdiction "depends on the particular facts in each case," noting that in the case before it "a cause of action arises from alleged defects in his product," 22 Ill.2d at 444, 442, 176 N.E.2d at 767, 766; the court assumed that "the trend in defining due process of law is away from the emphasis on

have occasion to review them, and their "effects" rationale is called into question by this Court's later ruling in *Kulko* v. *Superior Court*, *supra*, 436 U.S. at 98-99.

Only one product-liability case testing due-process jurisdictional protections has been decided by this Court: *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*. In it, this Court limited the *Gray* line of cases to circumstances in which "*a corporation* . . . delivers *its* products" for marketing in the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 298 (emphasis supplied). In other words, jurisdiction is to be asserted if at all only over the company marketing the dangerous and defective products, because that company has the power to "act to alleviate the risk" by if necessary "severing its connection with the State." *Id.* at 297. There is no suggestion that jurisdiction over a manufacturing company whose boiler blew up could also carry with it jurisdiction over a welder who worked on it.[35] Moreover, this Court emphasized that convenience is not the test and also that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295. The commentators and cases alike recognize that effects in the forum are not alone a sufficient basis for jurisdiction when those effects "are not of a sort highly dangerous to persons or things." RESTATEMENT (2D), CONFLICT OF LAWS, § 37 comment a; *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, *supra*, 597 F.2d at 602. Moreover, the Supreme Court of Illinois, citing *World-Wide Volkswagen*, has em-

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territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard;" it saw no due process problem if suit was brought "in the court where both parties can most conveniently settle their dispute." 22 Ill. 2d at 441, 443, 176 N.E.2d at 765, 766.

[35] Nor is it appropriate, where First Amendment activity is concerned, to view as acceptable a publisher's "if the risks are too great, severing its connection with the State." 444 U.S. at 297. If publishing is restricted and localized, then, as the trial court recognized, "the informed public would be the loser." J.A. 97-98.

phatically refused to apply its own effect rationale in *Gray* to a tort that did not involve a dangerous product. *Green* v. *Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 427 N.E.2d 1203 (1981).

The court below assumed that the most extreme product-liability cases governed a libel claim, and that jurisdictional requirements were satisfied by the bare allegations of the complaint that harm in the forum state had been intended and had occurred:

> "[I]t must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein." J.A. 114.

That is, however, a total *non sequitur*. It ignores the burden upon the plaintiffs to establish adequate jurisdictional facts[36]—to show sufficient contacts of Calder and South with the forum state as required by *International Shoe Co.* v. *Washington, supra*. Instead of contacts, the court below was satisfied with jurisdiction by allegation—allege an intentional injury in the state, and nothing more is required. That has never been the law.

It is certainly not the law when a libel case is brought against out-of-state employees of an out-of-state publisher. This Court often has noted the particularized case-by-case analysis that is required by *International Shoe*. See, *e.g.*, *Shaffer* v. *Heitner*, 433 U.S. 186, 202-04 (1977). A defamation action complaining of humiliation and injured feelings—not even damage to reputation—is not a boiler-explosion case involving mangled limbs. The injury, if any, is more difficult to identify and quantify, is more easily feigned, and the "product" does not hold

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[36] *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). "Facts, not mere allegations, must be the touchstone." *Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371, 372 (9th Cir. 1977).

danger to the public at large. "Due process considerations would undoubtedly be more restrictive if there were involved simply a dispute of commercial dimensions between parties to a commercial contract [than where] one introduces into a state a dangerous instrument." *Singer* v. *Walker*, 21 App. Div. 2d 285, 292, 250 N.Y.S.2d 216, 223 (1964).[37]

For many years now, courts and legislatures have treated product-liability litigation, involving manufactured products endangering the public generally, as subject to exceptional substantive rules. Many jurisdictions have adopted a standard of strict liability without fault, even though such is not the ordinary tort standard. It is not surprising therefore that some state courts, as in *Gray* and *Buckeye Boiler*, have adopted for dangerous products a sort of strict-liability rule as to jurisdiction as well.[38] But what is before this Court is not a dangerous-product case; and strict liability can never be applied in the field of libel. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

A newspaper may publish a story that causes anger or distress, but a newspaper is not an inherently dangerous object. Even if it is so characterized metaphorically, any danger to one person's reputation would not, like a defec-

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[37] Dissenting in *World-Wide Volkswagen, supra*, Mr. Justice Blackmun explained that he reached the result he did because "for me, a critical factor . . . is the nature of the instrumentality under consideration." "My position need not take me beyond the automobile and the professional who does business by way of distributing and retailing automobiles. Cases concerning other instrumentalities will be dealt with as they arise and in their own contexts." 444 U.S. at 318, 319.

[38] Just as jurisdictional rules were stretched to meet the physical danger from nonresident motorists, to reach "a nonresident doing acts within the state, involving danger to life or property." Scott, *Jurisdiction Over Non-Resident Motorists*, 39 HARV. L. REV. 563, 586 (1926). *Cf. Hess* v. *Pawloski*, *supra*, 274 U.S. at 356 ("Motor vehicles are dangerous machines . . . their use is attended by serious dangers to persons and property.").

tive manufactured item, threaten the public at large. A due process analysis must take account of these differences, and not stretch jurisdiction so far when there is no physical injury to be compensated. Appellee alleged no physical injury at all, nor even any damage to reputation. See J.A. 8-9.[39] What may be reasonable in some circumstances in product-liability cases is not appropriate when "there is no claim that appellant has visited *physical injury* on either property or person within the State of California." *Kulko* v. *Superior Court*, *supra*, 436 U.S. at 96-97 (emphasis supplied). *Cf. Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 500-01 (1971) (health hazard to public generally).

II. THE COURT OF APPEAL ERRED IN REFUSING TO GIVE WEIGHT TO THE FIRST AMENDMENT.

As demonstrated in the previous section, the Court of Appeal failed to apply "traditional principles" required by *International Shoe*, and instead assumed jurisdiction in spite of the absence of sufficient contacts with California by either defendant to meet traditional jurisdictional standards. This section deals with the Court of Appeal's further error of rejecting the First Amendment as a necesary component in analyzing assertion of extra-territorial jurisdiction over a publisher's employees.

A. Constitutional Policies Cannot Be Ignored in Jurisdictional Analysis.

It is a commonplace that in determining whether jurisdiction is fair and reasonable under *International Shoe*, *supra*, courts must consider all the circumstances bearing on a particular case, including the substantive policies

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[39] Her husband, Mr. Ingels, had alleged that he vomited on learning of the article. J.A. 78. Even if this could have been thought of as a jurisdictionally significant event, however, it was contradicted by evidence from others that he instead had laughed, J.A. 13, 71, and the trial court made no finding that his alleged stomach upset ever had occurred. Mr. Ingels no longer is a party to the case.

that are a part of the law. This has long been done in, for example, many cases that held that in order to avoid overburdening interstate commerce, restraint on extraterritorial jurisdiction was called for. *See, e.g., Davis* v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923). Moreover, to say that the "interest" of the several states concerned will be examined is often simply another way of saying that policy will be weighed. *Cf. Texas* v. *New Jersey*, 379 U.S. 674, 679 (1965).

This Court has looked also even to non-constitutional substantive policies in limiting state-court extraterritorial jurisdiction. Thus in *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), this Court refused to permit jurisdiction over a nonresident father who let his daughter visit her California mother, because to do so "would impose an unreasonable burden on family relations," 436 U.S. at 98, and because "to find personal jurisdiction in a State on this basis, merely because the mother was residing there, would discourage parents from entering into reasonable visitation agreements." *Id.* at 93. See also *May* v. *Anderson*, 345 U.S. 528, 533 (1953). "[T]he requisite minimum quantum of 'contact' between the defendant and the forum does and should vary with the measure of the values affected and the costs inflicted by the attempted exercise of power." Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 230 (1967).[40]

This Court in other cases as well has looked to non-constitutional policies in weighing jurisdiction. In *Hess* v. *Pawloski*, 274 U.S. 352 (1927), this Court referred to a fictional consent to jurisdiction from the use of a state's highways, but it also emphasized that "motor vehicles are

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[40] *Cf. Wright* v. *Yackley*, 459 F.2d 287 (9th Cir. 1972), holding that jurisdiction should not be asserted over nonresident physicians lest they be deterred from rendering medical assistance to residents. See generally Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1589 n.12 (1978); Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

dangerous machines." 274 U.S. at 356. As this Court later explained, the judgment that jurisdiction should attach was a practical one, one of policy based on the dangers from and mobility of interstate drivers. *Olberding* v. *Illinois C.R.R.*, 346 U.S. 338, 341 (1953) In *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), this Court permitted jurisdiction where it otherwise might not have, because of the state's especially strong interest in regulating insurance transactions of its residents, an interest reflected in special regulatory and jurisdictional legislation. See *Hanson v. Denckla*, *supra*, 357 U.S. at 252; *cf.* also *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623, 627 (1935) ("Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation.").

The First Amendment's policy of encouraging the flow of information and a healthy press throughout the country is a constitutional imperative to which a court cannot shut its eyes. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969); see also *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Yet the court below, reversing the trial court, *explicitly* decided the case as if the First Amendment did not exist. When as here a publisher's employees are sued for their work on their employer's newspaper, such a pretense—that a part of the Constitution is missing—cannot be allowed.

The First Amendment, in fact, has been more potent than most substantive constitutional provisions in influencing procedure. In *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931), this Court through Chief Justice Hughes held that the normal rules of equity do not apply when prior restraints on the press are involved. In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), ordinary criminal procedure was held an insufficient safeguard for the testing of First Amendment rights. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964), held that state-

court findings of fact are subject to an independent appellate review of the record in libel cases. See also, *e.g.*, *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Carroll* v. *President and Commissioners*, 393 U.S. 175 (1968); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). If the First Amendment means anything, it means that a state by whatever means, including jurisdictional statutes, cannot reach out to interfere unduly with the national market in information and ideas.

Moreover, to rely on the First and Fourteenth Amendments, in the interest of the federal system, to limit the extraterritorial reach of a state's power to regulate or punish the conduct of nonresidents is far less of an intrusion than to alter the state's substantive law itself. Yet there is no doubt that the First Amendment also has altered as necessary the substantive laws of the states, as for example by requiring that negligence not be an acceptable standard for liability when public figures are sued for libel. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 155 (1967). State civil and criminal statutes are tested more strictly for vagueness when First Amendment rights may be affected. See, *e.g.*, *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966). State courts' regulation of their bars, which normally is not questioned, will be invalidated if it too narrowly restricts First Amendment rights. *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). Two months ago in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 103 S. Ct. 1365 (1983), this Court held that a tax statute that otherwise might meet constitutional standards nevertheless failed when put to the added test of the First Amendment's protection of the press.[41] State statutes that establish jurisdiction of the

[41] "[I]t may well be that certain rules impervious to attack when applied to ordinary human conduct may have to be altered or abandoned when used to regulate speech." *Rosenbloom* v. *Metro-*

state's courts over nonresidents are not immune from similar First Amendment testing.

To imagine that an assertion of extraterritorial jurisdiction over publisher's employees can be evaluated without regard to the effect on the First Amendment's guarantees of "freedom of speech, or of the press" is to deny the Amendment's influence on procedural decisions for at least half a century. An analysis of contacts and interests—*not excluding First Amendment interests*—is exactly what the "contacts" requirement of *International Shoe* mandates. Indeed, the very same Fourteenth Amendment that tests the assertion of extraterritorial jurisdiction under *International Shoe Co.* v. *Washington* also makes the First Amendment applicable to the actions of California through its legislature and courts. *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). Preserving First Amendment freedoms is an "indispensable" part of the "concept of ordered liberty"[42] that the Fourteenth Amendment mandates—yet dispense with it is exactly what the court below did.

B. California's Assertion of Extraterritorial Jurisdiction Over a Florida Editor and Florida Reporter Unconstitutionally Burdens Activity Protected by the First Amendment.

This Court has warned, in speaking of libel actions, of the "risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and the press." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). For that reason, the majority of state and federal courts that have considered the issue have unhesitatingly applied the First Amendment's speech and

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media, Inc., 403 U.S. 29, 65 (1971) (Harlan, J., dissenting on other grounds).

[42] See *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949); *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). *Palko* noted that freedom of expression is an "indispensable condition, of nearly every other form of freedom." 302 U.S. at 327.

press protections as part of their analysis of extraterritorial jurisdiction. An early case to discuss the point at length was *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966), and many others have approved and followed it.[43] Their reasoning was succinctly summarized last year by Chief Judge Lord of the Eastern District of Pennsylvania, who concluded that

> "if courts freely found *in personam* jurisdiction over publishers of first amendment articles under the same standards imposed on commercial entities, the citizens of each state would soon find themselves with access only to those publications with instate revenues sufficiently high to justify the cost of litigation within that particular jurisdiction." *McCabe* v. *Kevin Jenkins & Associates, Inc.*, 531 F. Supp. 648, 655 (E.D. Pa. 1982).

Therefore "federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel." *Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937, *rehearing on other grounds*, 691 F.2d 989 (11th Cir. 1982). Those decisions were as recent as last year. More than fifteen years ago, Judge Medina commented that "I am not shocked to see the principles embedded in the First Amendment applied to the expanding subject of jurisdiction over the person." *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 184 (2d Cir. 1967) (concurring opinion).[44]

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[43] "[W]hen a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed." *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975). See also, *e.g.*, *Wolfson* v. *Houston Post Co.*, 441 F.2d 735 (5th Cir. 1971); *Walker* v. *Savell*, 335 F.2d 536 (5th Cir. 1964); *Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973); *Gonzales* v. *Atlanta Constitution*, 4 Media L. Rptr. 2146 (N.D. Ill. 1979).

[44] Judge Friendly for the court in that case said he preferred to think of the rule as that "the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters." 373 F.2d at 183-84. But jurisdiction must be estab-

Leading commentators on jurisdiction have approved the reasoning of this line of cases as necessary for the protection of First Amendment activity. Carrington & Martin, *supra*, 66 MICH. L. REV. at 240-43; Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1436 (1962); Leflar, *Conflict of Laws*, 36 N.Y.U. L. REV. 36, 42 (1961); see also RESTATEMENT (2D), CONFLICT OF LAWS § 37 at 159 (1971).

The same reasoning has been applied *a fortiori* to reject extraterritorial jurisdiction over a publishing company's employees. Thus in *Bradlee Management Services, Inc.* v. *Cassells*, 249 Ga. 614, 292 S.E.2d 717 (1982), the Supreme Court of Georgia applying a First Amendment test held that although a broadcasting company's contacts with the forum state were sufficient to permit jurisdiction over it, that was not so for an announcer who worked in a distant city and had not entered the forum state. Jurisdiction over an individual journalist also was rejected, in consideration of First Amendment policy, in *Margoles* v. *Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973). The same differentiation was made, and the same holding, in *Gonzales* v.

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lished before *forum non conveniens* can be considered. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 504 (1947).

The result of a state court's dismissal for lack of jurisdiction under *International Shoe* or for *forum non conveniens* would be similar. But the practical difference between the two would be substantial. The burden on the defendant in the latter approach would be much greater because of the need to appear and then to try to persuade the foreign court that as a forum it was not suitable. State courts tend to see themselves as convenient. *Cf. Texas* v. *New Jersey*, 379 U.S. 674, 679 (1965). The rules would be far less certain or predictable, also. Standards for applying *forum non conveniens* are extremely subjective, variable, and inconsistent, are difficult to review, and "that amorphous doctrine differs from jurisdiction to jurisdiction." See Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 596 (1958); Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422, 434, 437 (1975).

Atlanta Constitution, 4 Media L. Reptr. 2146 (N.D. Ill. (1979).[45]

First Amendment considerations in jurisdiction are particularly applicable where, as here, the plaintiff is admittedly a public figure—indeed, a celebrity. See J.A. 8-9. Moreover, she did not even claim that her reputation was damaged. J.A. 9. "[P]ublic figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective 'self-help.'" Also, "public figures, like public officials, have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.'" *Wolston* v. *Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979), *quoting in part Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Reporters and editors, employees of publishers, should not have to travel and perhaps retain counsel 3000 miles away to defend against a complaint that, because it is filed by a

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[45] The few cases that, like the decision below, held that the First Amendment should be ignored in the jurisdictional analysis, also ignored the rule of *International Shoe* that jurisdiction must be based on, first, contacts, and also, fairness. *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), *cert. denied sub nom. Times Mirror Co.* v. *Anselmi*, 432 U.S. 911 (1977), interpreted *International Shoe* and *McGee* v. *International Life Ins. Co.*, *supra*, as holding that "due process can be satisfied even though the contact with the state is limited to one business transaction." 552 F.2d at 324. From there it went on to decide that the First Amendment policy applied in other cases was subject to the "countervailing policy consideration" of "the extremely disadvantageous position that citizens of Wyoming would be placed in" if they could not sue locally. *Ibid.* The court also assumed, quite erroneously, that the Fifth Circuit no longer gave weight to the First Amendment in jurisdictional matters. *Ibid. Contra, e.g., Edwards* v. *Associated Press, supra; Cox Enterprises, Inc.* v. *Holt, supra.*

Church of Scientology v. *Adams*, 584 F.2d 893 (9th Cir. 1978), erroneously concluded that "[i]n a defamation case . . . the appropriate jurisdictional analysis should be to determine whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state." 584 F.2d at 897-98. *Contra, World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, 444 U.S. at 295.

public figure and does not even allege damage to reputation, may not even be constitutionally sufficient.[46]

It does not require lengthy exposition to demonstrate the burden on an individual in Florida who must defend a suit for $20,000,000 unliquidated compensatory and punitive damages in a state court in California. Judge Learned Hand once commented that "After now some dozen years of experience I must say that as a litigant I should dread a law suit beyond almost anything else short of sickness and death." *Address*, 3 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, LECTURES ON LEGAL TOPICS 105 (1926). And worse than being a defendant in a local court is being a defendant in a court nearly three thousand miles away. *Cf. Hutchinson* v. *Proxmire*, 443 U.S. 111, 123 (1979).

Whether the reporter's employer is a co-defendant does not remove the burden.[47] To the extent the employer (as here) chooses to defend the assertion of extraterritorial jurisdiction over its employees, the burden on the press is increased. To the extent it does not—as could happen if the publisher and the reporter had inconsistent defenses—the cost of defending litigation for the reporter could be ruinous, and the pressure for reporters to trim their sails to avoid lawsuits all the greater. If the reporters could purchase insurance (and California like

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[46] See *Hutchinson* v. *Proxmire*, 443 U.S. 111, 134 (1979), identifying "protection to the reputation of an individual" as the constitutionally significant purpose of libel law. *Time, Inc.* v. *Firestone*, 424 U.S. 448, 460 (1976), assumed that injury to reputation there had occurred even though compensation for it was not sought; in the present case, however, damage to reputation is negated in the complaint. J.A. 9. "The interest at stake in all defamation is concededly the reputation of the person assailed." *Grant* v. *Reader's Digest Ass'n*, 151 F.2d 733, 734 (2d Cir. 1945), *cert. denied*, 326 U.S. 797 (1946) (L. Hand, J.).

[47] "[T]he connection of one counterdefendant with Illinois cannot be attributed to another simply because they have a common interest." *Green* v. *Advance Ross Electronics Corp.*, *supra*, 86 Ill.2d at 440, 427 N.E.2d at 1208.

many states does not permit insurance against punitive damages),[48] that cost would be an added burden on the press; and to the extent reporters had to insure against possible suits in every distant state, the risk would be large and unpredictable. If they themselves paid, all that it would take would be one major lawsuit in a distant forum to wipe out most journalists financially; that could occur whether ultimately they won or lost.

As Judge Sobeloff writing for the court noted in *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956),

> "We cannot shut our eyes to the disorder and unfairness likely to follow from sustaining jurisdiction in a case like this. It might require corporations from coast to coast having the most indirect, casual and tenuous connection with a State to answer frivolous law suits in its courts. To permit this could seriously impair the guarantees which due process seeks to secure." 239 F.2d at 507.

The burden of frivolous suits is illustrated, indeed, by this very case. For more than three years the plaintiff Marty Ingels pursued his lawsuit against Appellants as well as their employer the National Enquirer. He accused them in a verified complaint of publishing an article about him that was "false, untrue, libelous and defamatory," J.A. 9, 14, and declared under penalty of perjury that "it was all untrue" and a "pack of lies." J.A. 78. Then, without explanation, he voluntarily dismissed his complaint.[49] The expense to other defend-

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[48] See *City Products Corp.* v. *Globe Indemnity Co.*, 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979).

[49] "[K]nowing that the court will automatically assume jurisdiction over a distant defendant, plaintiffs may file nuisance suits in the hope of obtaining settlement offers which will be increased by the defendant's expense of litigating in a foreign state. If plaintiffs do not have the burden of establishing minimum contacts such nuisance suits will only be encouraged." Ottonello, *supra* p. 22, at 28 (footnotes omitted).

ants of investigating and defending against those now-abandoned charges has been substantial.[50] As one study observed:

> "The determination [of extraterritorial personal jurisdiction] is a crucial one. The maintenance of suit in an improper forum may subject the defendant to unwarranted financial hardship because of the high costs of transportation, to hostile triers of fact with an unavowed prejudice in favor of the local plaintiff or with a propensity for awarding large sums in damages, and often to the application of substantive rules of law less favorable to the defendant than those which might be applied in another court." Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 911 (1960); *cf. Michigan C.R.R.* v. *Mix*, 278 U.S. 492, 495 (1929).

Those considerations are particularly germane to libel litigation, in which "the cost of litigating a libel action, burdensome on even the largest news organizations, often can cripple smaller news operations." *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 280 n.76 (3d Cir. 1980).[51]

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[50] "A defendant facing a lawsuit brought in bad faith or on little factual or legal basis has a difficult choice: to settle and perhaps encourage similar lawsuits, or to engage in expensive litigation. The farther away the forum of the lawsuit, the more vulnerable is the local manufacturer to what might be called 'legalized backmail.'" Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 50 (1980).

"It must be remembered that lawsuits can be brought on frivolous demands or groundless claims as well as on legitimate ones, and that procedural rules must be designed and appraised in the light of what is fair and just to both sides in the dispute. Interpretations of basic rights which consider only those of a claimant are not consonant with the fundamental requisites of due process." *Gray* v. *American Radiator & Standard Sanitary Corp.*, *supra*, 22 Ill. 2d at 441, 176 N.E.2d at 766.

[51] The court went on:

"Five years ago, the minimum cost of defending a "full-fledged libel suit' was estimated at $20,000.00. Anderson, *Libel and*

The threat of litigation expense magnified in distant forums for the individual editor or reporter is no less an inhibition than others this Court has invalidated because they inevitably lead to suppression of speech "by inducing excessive caution in the speaker." See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

C. The Objective of Punishing Speech Is Not Sufficient To Support Extraterritorial Jurisdiction Over a Publisher's Employees.

The trial court observed that as a practical matter, Appellee could obtain from the publishing company any compensatory damages to which she was entitled. "[I]t appears that the principal practical effect of holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals." J.A. 96-97. The trial court went on to note that

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Press Self-Censorship, 53 Texas L. Rev. 422, 435-36 (1975). The successful defense of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) was nearly $100,000.00. *Id.* In *Spouse* v. *Clay Communication, Inc.*, 211 S.E.2d 674, 690-91 (W.Va.), *cert. denied*, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975), the West Virginia Supreme Court of Appeals expressed concern that in its state, 'where a large portion of the State is served by newspapers which lack substantial financial assets, the threat of potential libel actions becomes repressive, not only because of possible judgments but also because of the inordinate legal expenses normally incurred in defending a protracted libel suit.' *See also Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 610 n.40, 96 S.Ct. 2791, 2827, 49 L.Ed.2d 683 (1976) (Brennan, J., concurring in the judgment); Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 Hofstra L. Rev. 655, 713 (1979); Note, *In Defense of Truth in Defamation Law*, 88 Yale L.J. 1735, 1742-43 & n.39 (1979)." *Ibid.*

See also *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1083 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

> "Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness." J.A. 97.

That observation is surely correct, and indeed should be dispositive of this case. Punitive damages are punishment; they are quasi-criminal "private fines," and if collected are simply a windfall to which a plaintiff has no fundamental claim of right. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *cf. City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981). "Punitive damages may be employed to punish unpopular defendants," *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 n.14 (1979)—a category of defendants in which nonresidents and writers of stories critical of local heroes are likely to figure prominently. See *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 350; cf. *New York Times Co.* v. *Sullivan*, *supra*. At least two courts, recognizing this, have held that punitive damages for libel violate the First and Fourteenth Amendments. *Sprouse* v. *Clay Communication, Inc.*, 211 S.E.2d 674 (W. Va.), *cert. denied*, 423 U.S. 882 (1975); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556, 570 (La. App. 1980), *cert. denied*, 452 U.S. 941 (1981). Other states have arrived at the same result applying the free speech and free press guarantees of their own constitutions.[52]

Whether or not punitive damages are allowable at all in libel cases, it is clear that the interest in obtaining them from a nonresident publisher's nonresident employee cannot weigh very heavily, if at all, under *International Shoe*. Indeed, to the extent that in essence such claims are inherently penal, they could be rejected on the

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[52] See *Hall* v. *May Dept. Stores*, 292 Ore. 131, 637 P.2d 126 (1981); *Taskett* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 859-60, 330 N.E.2d 161, 169 (1975).

long-recognized ground that nonresident individuals may not be subjected to penal jurisdiction *in absentia*. *Cf. Hopt* v. *Utah*, 110 U.S. 574 (1884).[53]

III. CALIFORNIA'S ASSERTION OF EXTRATERRITORIAL JURISDICTION OVER THESE FLORIDA INDIVIDUALS UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE.

It has been recognized at least since *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), that states may not enact laws that place an undue burden on the flow of commerce among the states that is protected by the Commerce Clause, Article I, § 8. See also, *e.g.*, *Edgar* v. *Mite Corp.*, 457 U.S. 624 (1982); Stone, *Fifty Years' Work of the United States Supreme Court*, 8 ORE. L. REV. 248, 252-54, 261-62 (1929). This Court also has held that the statutory assertion by a state of jurisdiction over an out-of-state defendant may itself unduly burden interstate commerce, and be for that reason invalid. Several state jurisdictional statutes as applied to interstate enterprises were rejected on that basis by this Court in a series of opinions by Mr. Justice Brandeis. *Michigan C.R.R.* v. *Mix*, 278 U.S. 492 (1929); *Atchison, T & S.F. Ry.* v. *Wells*, 265 U.S. 101 (1924); *Davis* v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923); see also *Denver & R.G.W.R.R.* v. *Terte*, 284 U.S. 284 (1932); *International Milling Co.* v. *Columbia Transp. Co.*, 292 U.S. 511 (1934).[54]

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[53] When a state seeks to obtain jurisdiction of a nonresident natural person to answer penal claims, the only prescribed method is by extradition. See U.S. CONST., Art. IV, § 2. *International Shoe* has not been applied to penal matters. *Cf. International Harvester Co.* v. *Kentucky*, 234 U.S. 579 (1914). See *State* v. *Luv Pharmacy, Inc.*, 118 N.H. 398, 403-05, 388 A.2d 190, 193-94 (1978).

[54] "While this circumstace might enable plaintiff to try his cause there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden on interstate commerce. And, we have held, it is the infliction of the burden

The same Term that this Court decided *International Shoe Co.* v. *Washington, supra,* it also decided *Nippert* v. *City of Richmond,* 327 U.S. 416 (1946). In *International Shoe* this Court had loosened some of the strict territorial limitations on jurisdiction established in *Pennoyer* v. *Neff,* 95 U.S. 714 (1878). In *Nippert* v. *City of Richmond* this Court in weighing a state's jurisdiction to tax persons "engaged in business as solicitors" referred to its then recent holding in *International Shoe,* and recognized that regular and continuous solicitation of sales in a state might suffice to sustain jurisdiction against a purely due process challenge. 327 U.S. at 426. Nevertheless, said the Court, there were "other prohibited effects." *Ibid.* The Court observed that for many sellers the limitation imposed by the state might be "not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun." *Id.* at 429. This burden would be multiplied by "the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town." *Id.* at 429-30. The Court emphasized that when state statutes are tested against the Commerce Clause, "practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." *Id.* at 431. State statutes that, like California's long-arm statute, aim particularly at non-residents, are especially subject to scrutiny, because non-residents cannot vote:

> "Provincial interests and local political power are at their maximum weight in bringing about acceptance

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that deprives the courts of jurisdiction over cases like this." *Denver & R.G.W.R.R.* v. *Terte, supra,* 284 U.S. at 287.

In many other contexts this Court realistically has recognized that having to defend in court may itself be an enormous and undue burden. See, *e.g., Hutchinson* v. *Proxmire,* 443 U.S. 111, 123 (1979) (protection "not only from the consequences of litigation's results but also from the burden of defending themselves"); *Helstoski* v. *Meanor,* 442 U.S. 500 (1978); *Abney* v. *United States,* 431 U.S. 651 (1977); *Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479, 487 (1965).

> of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against." *Id.* at 434.

The barrier to trade from having to defend suits in distant jurisdictions can well turn out to be more onerous than the burden of paying a tax, and it is far less foreseeable.[55] The burden on interstate commerce weighs even more when imposed through employees of a publisher, not just because of the First Amendment concerns that are involved, see pp. 33-46, *supra*, but also because libel is a type of action in which defense costs are high and the size of jury verdicts (for unquantifiable general damages and for punitive damages) is often enormous and always unpredictable. The burden is not diminished by, as here, seeking to impose the extraterritorial jurisdiction on the publisher's employees—because what inhibits them inevitably inhibits the product of the employer for which they work. And unlike a publishing company, which usually does business as here in corporate form, the liability of an individual to pay a judgment is not limited by law.

State long-arm jurisdictional statutes, like other state intrusions that affect interstate commerce, must be tested under the Commerce Clause to weigh whether the burden is inappropriate. *Froning & Deppe, Inc.* v. *Continental Illinois Bank & Trust Co.*, 695 F.2d 289 (7th Cir. 1982). Unwarranted state assertions of extraterritorial jurisdiction can be a "serious threat and deterrent to the free flow of commerce between the states." *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc., supra*, 239 F.2d at 507.

Newspapers are a significant part of the free flow of commerce. *Cf. United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1

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[55] It has been recognized that assertions of jurisdiction of a state to tax non-residents, and of jurisdiction to apply judicial power to them, present similar issues. *See, e.g., Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 506 (4th Cir. 1956).

(1945). To stifle and inhibit their circulation, by the added threat of expense and punishment for their employees by courts and juries in distant places, would burden not only free trade in commerce, but also "free trade in ideas." [56]

IV. THIS COURT'S JURISDICTION ON APPEAL IS PROPER.

Appellee has argued that the provisions of 28 U.S.C. § 1257(2) do not apply to this appeal because the California statute is drafted on its face to conform to constitutional limits. Therefore, Appellee asserts, "the clear language of this statute makes it clear that it is impossible for it to be unconstitutional on its face or as applied . . . ." Motion to Dismiss or Affirm at 2.

That argument is half tautology and half *non sequitur*. It is correct that by definition a statute drafted in terms to be limited to what is constitutional cannot be unconstitutional *on its face*. But it is certainly not "impossible" for such a statute to be *applied* in an unconstitutional manner; indeed, that is exactly what Appellants have complained of here. J.A. 106. It is well established that when a state statute *as applied* is challenged as repugnant to the United States Constitution and the challenge is rejected by the state court, this Court has jurisdiction on appeal under 28 U.S.C. § 1257(2). See, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921). That principle applies to challenges to long-arm statutes as applied, as well as to others. See, *e.g.*, *International Shoe Co.* v. *Washington*, *supra*, 310 U.S. at 313; *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623, 626 (1935).

Kulko v. *Superior Court*, *supra*, which Appellee cites, involved a different kind of record. In that case, this

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[56] *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Court noted, "Appellant did not argue below that this statute was unconstitutional." 436 U.S. at 90 n.4. Here Appellants *did* so argue to the court below, *e.g.*, J.A. 105, 106, and that court held that the statute could be applied to Appellants nevertheless. It is difficult to imagine how the challenge and rejection could have been clearer.[57]

Under Appellee's novel theory, decisions upholding state statutes challenged as applied could never be heard by this Court on appeal if the statutes were drafted to be constitutional on their face. That notion was long ago rejected. *Dahnke-Walker Milling Co.* v. *Bondurant*, *supra*. This Court has jurisdiction under 28 U.S.C. § 1257(2).[58]

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

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[57] The statute also was challenged in the other California courts. See, *e.g.*, J.A. 85, 120-121.

[58] Appellants have requested that if for any reason jurisdiction under 28 U.S.C. § 1257(2) were deemed lacking, the appeal be treated as a petition for certiorari in accordance with 28 U.S.C. § 2103. Jurisdictional Statement at 3 n.1. The jurisdictional requirements for certiorari under 28 U.S.C. § 1257(3) are clearly met.

APPENDIX A

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION, ARTICLE I:

"Section. 8. The Congress shall have Power . . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

ARTICLE IV:

"Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which the Acts, Records and Proceedings shall be proved, and the Effect thereof.

"Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. . . ."

FIRST AMENDMENT:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . ."

APPENDIX B

EXCERPT FROM DEPOSITION OF JOHN ROBERT LUCAS
DECEMBER 14, 1981

* * * *

[151] By Mr. Ablon: Did you ever meet with Mr. John South in California in connection with this article?

A This article?

Q Yes.

A No.

Q Did you ever meet with Mr. South in California?

A Yes.

Q On how many occasions?

A Six or seven.

Q On none of those occasions was this article [152] discussed or dealt with in any degree?

A We weren't—he wasn't allowed to discuss it with me.

Q No, no. I'm not talking before its publication. At the time you were working on the article?

A No.

Q Before it had ever been published, had you ever had occasion to talk to Mr. South about it in California?

A No.

Q To the best of your recollection, how many conversations did you have with Mr. South concerning the subject article or your work in connection with the subject article?

A One conversation.

Q I take it that was a telephone conversation?

A You're right.

Q Other than that one telephone conversation to Mr. South, you had no other conversations with Mr. South or anyone else at the National Enquirer—

A That's correct.

Q —concerning the subject article or the preparation?

A That's correct.

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